(2)

No. 99-2002

Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

BNL EQUITY CORPORATION (formerly known as UNITED ARKANSAS CORPORATION), BNL FINANCIAL CORPORATION (formerly known as UNITED IOWA CORPORATION), WAYNE E. AHART, KENNETH TOBEY and BARRY N. SHAMAS,

*Petitioners,*

*v.*

MYRA JO PEARSON, PAUL PEARSON and JAMES STILWELL,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

## BRIEF IN OPPOSITION

JAMES R. PENDER
MICHAEL J. PTAK
PENDER, MCCASTLAIN & PTAK, P.A.
900 South Shackleford
Suite 750
Little Rock, Arkansas 72211
(501) 312-2020

PETER G. KUMPE
WILLIAMS & ANDERSON LLP
Twenty-Second Floor
111 Center Street
Little Rock, Arkansas 72201
(501) 372-0800

JOHN E. TULL III
*Counsel of Record*
PATRICK W. MCALPINE
QUATTLEBAUM, GROOMS, TULL & BURROW PLLC
111 Center Street
Suite 1850
Little Rock, Arkansas 72201
(501) 379-1700

*Attorneys for Respondents*

161604

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

27pp

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Table of Cited Authorities | iii |
| Reasons for Denying the Writ | 1 |
| I. The Decision Of The Supreme Court Of Arkansas Is Consistent With Decisions Of This Court, Circuit Courts Of Appeals, And Sister States. | 1 |
| A. The Supreme Court Of Arkansas' Decision In *BNL Equity* Does Not Conflict With Decisions Of This Court. | 2 |
| B. The Supreme Court Of Arkansas' Decision In *BNL Equity* Does Not Conflict With Decisions Of The Circuit Courts Of Appeals. | 5 |
| C. The Supreme Court Of Arkansas' Decision In *BNL Equity* Does Not Conflict With The Approach Of Sister States. | 8 |
| II. This Court Should Not Grant Certiorari Because Of Well-Settled Jurisdictional And Prudential Principles. | 11 |
| A. The Arkansas Supreme Court's Decision Is Based On An Independent And Adequate State Ground. | 11 |

*Contents*

*Page*

B. Arkansas Rule Of Civil Procedure 23 Is A Procedural Rule That Does Not Implicate Substantive Rights. ..... 15

C. A Grant Of Certiorari In This Case Would Violate Fundamental Principles Of The Constitutional Federal System. ..... 16

III. Petitioners Did Not Properly Raise Or Preserve The Question Presented By Their Petition. ..... 17

Conclusion ..... 21

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Adams v. Robertson*, 520 U.S. 83 (1997) ..... 11, 12, 17, 18, 19

*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ..... 4, 5

*Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) ..... 18

*Carroll v. Cellco Partnership*, 713 A.2d 509 (N.J. Super. Ct. App. Div. 1998) ..... 10

*Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) ..... 6, 7, 10

*Coleman v. Thompson*, 501 U.S. 722 (1991) ..... 13

*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) ..... 2, 3

*Ex parte Equity National Life Ins. Co.*, 715 So. 2d 192 (Ala. 1997) ..... 9

*Ex parte Mayflower National Life Ins. Co. v. Heard*, 2000 WL 548211 (Ala. May 5, 2000) ..... 9

*Ford Motor Co. v. Sheldon*, 2000 WL 566766 (Tex. 2000) ..... 10

*Cited Authorities*

*Page*

*Fraley v. Williams Ford Tractor Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999) ..... 10, 14, 15

*General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) ..... 1, 2, 3, 4, 8, 10

*Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994) ..... 6, 7

*Heath v. Alabama*, 474 U.S. 82 (1985) ..... 18

*Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) ..... 3

*Lambrix v. Singletary*, 520 U.S. 518 (1997) ..... 13

*Michigan v. Long*, 463 U.S. 1032 (1983) ..... 13

*Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) .. 4, 5

*Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (8th Cir. 1999) ..... 5

*Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985) . 15

*Southwestern Refining Co., Inc. v. Bernal*, 2000 WL 566745 (Tex. 2000) ..... 10

*Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) ..... 6, 7

*Cited Authorities*

*Page*

**Statute:**

Ark. Code Ann. § 23-42-106(a)(1) ..... 7

**Rules:**

Arkansas Rule of Civil Procedure 23 ..... *passim*

Arkansas Rule of Civil Procedure 23(a) ..... 9

Arkansas Rule of Civil Procedure 23(b) ..... 9

Federal Rule of Civil Procedure 23 ..... 4, 6, 7, 10, 16

Supreme Court Rule 14(g)(i) ..... 19, 20

**Other Authorities:**

Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4021 (2d ed. 1996 and Supp. 2000) ..... 15, 16, 17

## REASONS FOR DENYING THE WRIT

Petitioners ask this Court for a writ of certiorari based on their claim that Arkansas Rule of Civil Procedure 23 violates constitutional due process because the Supreme Court of Arkansas' interpretation of Rule 23 does not employ the "rigorous analysis" approach discussed in *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

The writ should be denied because the issue sought to be reviewed does not present a compelling case for this Court's review. It does not demonstrate a conflict with decisions of this Court, Circuit Courts of Appeals, or highest courts in sister states. This Court's jurisdictional and prudential requirements militate against a grant of certiorari in this case. Further, Petitioners did not adequately present the issue to the trial court and to the Supreme Court of Arkansas. Under United States Supreme Court Rules and precedent, issues to be reviewed by certiorari must be presented with "fair precision and in due time." Petitioners' claim was not thus preserved. The writ should be denied.

### I.

### THE DECISION OF THE SUPREME COURT OF ARKANSAS IS CONSISTENT WITH DECISIONS OF THIS COURT, CIRCUIT COURTS OF APPEALS, AND SISTER STATES.

Petitioners claim that the decision of the Arkansas Supreme Court creates a conflict with decisions of this Court, the Circuit Courts of Appeals, and courts of last resort in sister states. *See* Petition for Writ of Certiorari (hereinafter, "Petitioners' Brief"), at 17-26.

## A. THE SUPREME COURT OF ARKANSAS' DECISION IN *BNL EQUITY* DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

The Supreme Court of Arkansas' decision does not conflict with the decisions of this Court. Specifically, the opinion at issue here is completely consistent with both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

*Eisen* was a class action brought by odd-lot securities traders against brokerage firms and a stock exchange for violation of the securities and antitrust laws. This Court reversed the Circuit Court and held that the plaintiffs' claims could proceed as a class action. The *Eisen* decision laid out the applicable rule for district courts' consideration of class actions under Rule 23:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.

*Id.* at 177-78. The Court went on to summarize:

> Additionally, we might note that a preliminary determination of the merits may result in

> substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.

*Id.* at 178.

*Falcon*, on the other hand, was a class action brought by an employee under Title VII. The district court in that case did not hold an evidentiary hearing before certifying the class. *See Falcon* at 152. This Court stated:

> Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

*Id.* at 160. Thus, the "rigorous analysis" petitioners contend is mandated by this Court can be anything from looking at the face of the pleadings to a full-blown evidentiary hearing, but it must stop short of examining the merits of the case. *See Eisen* at 177.

Petitioners' claim that the Arkansas Supreme Court interpreted *Falcon* too narrowly is incorrect on the face of the opinion itself. This Court's holding in *Falcon* was ***specifically limited*** to Title VII class actions. *Falcon* at 161. *Falcon*'s "rigorous analysis" language was a direct reaction to the Fifth Circuit's "across-the-board" approach to class certification first announced in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969). Under the "across-the-board" approach, a Title VII plaintiff could

challenge every employment practice of a particular employer, even though that particular employee was not harmed by each and every one of those practices. *Falcon* rejected that approach, holding that Title VII plaintiffs are subject to the strictures of Federal Rule 23, just like any other private plaintiff.

Contrary to petitioners' assertions, the Supreme Court of Arkansas did not expressly reject the "rigorous analysis" approach in its decision in *BNL Equity*. The essence of the state court's holding is that the case cannot be tried at the class certification stage. While the Supreme Court of Arkansas has expressly prohibited trial courts from delving into the merits of the case at the class certification stage, nothing in this holding (or in the holdings of any of the cases decided on this point in recent years) prevents Arkansas trial courts from conducting a "rigorous analysis" of Rule 23 issues; the trial court in this case did in fact conduct such a "rigorous analysis." *See* Part I.C, *infra*. The trial court and appellate court's decisions unquestionably provided petitioners the due process protections guaranteed by the United States Constitution.

Moreover, the other cases relied upon by petitioners, *Ortiz* and *Amchem*, are class action *settlement* suits. Respondents concede that a more rigorous analysis is necessary for settlement classes because substantive rights of class members are directly implicated by the courts' decisions. However, a settlement class is inherently distinct from the initial certification of a class.

In *Amchem* and *Ortiz*, the parties agreed upon a class definition and a settlement before formally initiating litigation. According to the Eighth Circuit,

> The difficulty inherent in such a situation is that a district court "lack[s] the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."
>
> * * *
>
> The difficulties associated with settlements like those in Amchem and Ortiz — the possibility of "collusion between class counsel and the defendant . . . [and] the need for additional protections when the settlement is not negotiated by a court designated class representative," . . . — are therefore not present here.

*Petrovic v. Amoco Oil Co.*, 200 F.3d 1140 (8th Cir. 1999) (citations omitted). The process and protections necessary in *Amchem* and *Ortiz* were fundamentally different from the initial class certification process in this case. Under Arkansas Rule of Civil Procedure 23, the trial court retains jurisdiction to adjust, modify, or decertify the class at any time, thus avoiding the problems addressed in *Amchem* and *Ortiz*. Therefore, those cases are inapposite to the situation before this Court.

## B. THE SUPREME COURT OF ARKANSAS' DECISION IN *BNL EQUITY* DOES NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS.

The Circuit Courts of Appeals cases cited by petitioners do not compel a grant of certiorari in this case. Petitioners principally rely on three cases from the Fifth, Sixth, and District of Columbia Circuits to support their argument that

Arkansas' class certification approach is improper. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998); *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994). Those three cases are clearly distinguishable in several ways.

The three cases cited by petitioner are federal court cases construing Federal Rule of Civil Procedure 23. As discussed above, there are inherent distinctions between the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure, even though the Supreme Court of Arkansas has stated that construction of Arkansas Rule 23 should be guided by federal precedent. Nonetheless, the Supreme Court of Arkansas is free at any time to interpret its own rule as it desires, so long as that construction is consistent with the U.S. Constitution. Moreover, the Supreme Court of Arkansas is free to apply federal precedent as it sees fit to construe its own rule. This is especially true when the federal precedent is ambiguous, as it is here.

The Fifth Circuit case cited by petitioners was a multistate tobacco suit. *See Castano*, 84 F.3d 734. A key point in the Fifth Circuit's decision to reverse class certification was that variations in state law could affect the predominance requirement of Rule 23. The Fifth Circuit reversed, at least in part, because "the district court's consideration of state law variations was inadequate .... Nothing in the record demonstrates that the court critically analyzed how variations in state law would affect predominance." *Castano* at 743.

To the contrary, the Arkansas Supreme Court faced none of these considerations in the *BNL Equity* case. The issue in *BNL Equity* is straightforward — whether or not the

petitioners violated Ark. Code Ann. § 23-42-106(a)(1). It is purely an issue of Arkansas law. As such, the primary consideration underlying the Fifth Circuit's decision in *Castano* is not present in this case.

The petitioners also cite the Sixth Circuit case of *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), which was a class action brought under ERISA. Again, the *Sprague* case construed Rule 23 of the Federal Rules of Civil Procedure rather than a comparative state provision. The decision turned on unique provisions of ERISA that affected Rule 23 considerations. Thus, the concerns facing the Sixth Circuit in *Sprague* are not applicable here.

The petitioners' reliance on *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994), is also misplaced. *Hartman* involved a gender discrimination class action brought by employees of the United States Information Agency (USIA) against the agency. The court discussed the necessity for a rigorous analysis in the employment discrimination context because of the particular distinctions inherent in individual jobs. Specifically, the D.C. Circuit stated:

> We emphasize that there is no requirement in this circuit that a trial court conduct an evidentiary hearing or make specific factual findings on the issue of class certification in every case. *But in this instance* the paucity of the record on the question of the appropriate class certification effectively precludes us from performing our reviewing task.

*Id.* at 1473. Thus, the D.C. Circuit case cited by petitioners reemphasizes the point that the level of inquiry in class

certification analysis is case-specific and varies according to the facts.

The Supreme Court of Arkansas' approach, as outlined in *BNL Equity*, does not conflict with the approach used by various Circuit Courts of Appeals because each case relied upon by the petitioners can be easily distinguished on its facts. Moreover, the *BNL Equity* trial and appellate courts reviewed the class certification motion with the proper scrutiny as outlined by Arkansas precedent. Indeed, the trial court's opinion thoroughly analyzed the relevant authorities and applied the law therein enunciated to the facts before it in *BNL Equity*, concluding that class certification was appropriate. *See* Appendix to Petitioners' Brief at 19a-42a. The petition for certiorari should be denied.

## C. THE SUPREME COURT OF ARKANSAS' DECISION IN *BNL EQUITY* DOES NOT CONFLICT WITH THE APPROACH OF SISTER STATES.

Finally, petitioners argue that the Supreme Court of Arkansas' approach varies from that of sister states. To support this assertion, petitioners cite cases from Texas, South Carolina, and (in a footnote) Alabama and New Jersey. In reality, the cases cited by petitioners do not reflect that other states have a different procedure than Arkansas. Instead, these cases indicate that petitioners are elevating form over substance. While some other states have embraced the "rigorous analysis" language of *Falcon*, the substance of those states' actual procedure for certifying class actions is virtually indistinguishable from Arkansas' procedure.

The Alabama case cited by petitioners is a classic example. In *Ex parte Mayflower National Life Ins. Co. v. Heard*, 2000 WL 548211 (Ala. May 5, 2000), the Alabama Supreme Court elaborated on its definition of "rigorous analysis:"

> The United States Supreme Court, applying Rule 23 of the Federal Rules of Civil Procedure, has said that, before issuing any class certification order, a trial court must be "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *The essence of this holding, it appears to us, is that every class certification must, at a minimum, identify each of the four elements of Rule 23(a) and explain in detail how the proponents of the class have met their burden of proving those elements.*

*Id.* at *2 (quoting from *Ex parte Equity National Life Ins. Co.*, 715 So. 2d 192 (Ala. 1997)) (quotations omitted) (emphasis added).

Under this definition of "rigorous analysis," it is clear that the Pulaski County Circuit Court's class certification order satisfies the requirements. The trial court's certification order analyzed each of the requirements of Arkansas Rule of Civil Procedure 23(a) and then discussed in detail the requirements of Rule 23(b). *See* Appendix to Petitioners' Brief at 24a-34a (discussing language of Rule 23(a) and (b)) and 34a-41a (applying the law to the particular facts of this case). Thus, even assuming that petitioners' characterization of the Arkansas Supreme Court's holdings on this issue are correct, petitioners are still attempting to elevate form over substance. The trial court *did* employ a "rigorous analysis"

in this case even though it was not specifically required to do so under Arkansas law.

In the New Jersey case cited by petitioners, the court reversed a certification order "because of the trial court's too brief analysis . . . ." *Carroll v. Cellco Partnership*, 713 A.2d 509, 514 (N.J. Super. Ct. App. Div. 1998). The *Carroll* case involved class-wide issues affected by variance in state law. As in the Fifth Circuit's *Castano* decision, the trial court failed adequately to consider how variance in state law would affect the predominance requirement of Rule 23. Thus, the New Jersey court's decision was based on the particular facts of the case. It also does not add to any supposed "conflict" between states because it is not a decision of the highest court in New Jersey.[1]

The Texas cases cited by petitioners liberally cite *Castano* while restating the *Falcon* rule of "rigorous analysis." Importantly, the main case cited by petitioners, *Southwestern Refining Co., Inc. v. Bernal*, 2000 WL 566745 (Tex. 2000) states very clearly that federal case law on Rule 23 is only "persuasive authority" in the state court context. *Southwestern Refining Co. v. Bernal*, 2000 WL 566745 at *7; *see also Ford Motor Co. v. Sheldon*, 2000 WL 566766, at *6. Since the same type of approach is used in Arkansas,[2]

---

1. The New Jersey case is not a decision of the highest court of that state; rather, it is a decision from the Superior Court, Appellate Division. *See Carroll v. Cellco Partnership*, 713 A.2d 509 (N.J. Super. Ct. App. Div. 1998).

2. *See Fraley v. Williams Ford Tractor Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999) ("We have said that we will interpret Ark. R. Civ. P. in the same manner the federal courts interpret the comparable Fed. R. Civ. P. 23.").

a careful analysis shows there is no true conflict between the Supreme Court of Arkansas's Rule 23 precedent and holdings of this Court, the Circuit Courts of Appeals, or highest courts of sister states.

## II.

## THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE OF WELL-SETTLED JURISDICTIONAL AND PRUDENTIAL PRINCIPLES.

The jurisdiction of this Court to review decisions of state courts has been historically limited by constitutional and prudential concerns. Review of state court decisions by this Court is antithetical to the federal system of government contemplated by the United States Constitution and reinforced by decisions of this Court. Petitioners have asserted no compelling grounds on which this Court has jurisdiction to issue a writ of certiorari. Under the doctrines discussed below, this Court should deny the petition for writ of certiorari.

### A. THE ARKANSAS SUPREME COURT'S DECISION IS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court clearly stated the principles governing certiorari in a situation similar to the one at bar:

> Here, the Alabama Supreme Court has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action settlements satisfy

> the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges.

*Adams v. Robertson*, 520 U.S. at 90. The Court went on to state:

> Here, even if the state court's construction of its class-action rules would not obviate the due process challenge, it would undoubtedly aid our understanding of those rules as a predicate to our assessment of their constitutional adequacy. And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

*Id.* at 91.

This well-established principle of deference to states on questions of purely state law is embodied in the constitutional principle of "independent and adequate state grounds." Under this doctrine,

> this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." We in fact lack jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.

*See Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)) (citations omitted).

The test for adequate and independent state grounds is most eloquently stated in *Michigan v. Long*:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

*Michigan v. Long*, 463 U.S. 1032 (1983).

Here, it is evident that the state court decision of which petitioners seek review is supported by "bona fide separate, adequate, and independent grounds." The decision is based squarely on Supreme Court of Arkansas case precedent and

the language of Arkansas Rule of Civil Procedure 23. While it is true that Arkansas courts rely on federal precedent in construing Arkansas Rule of Civil Procedure 23, *see Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999), it does not automatically follow that a federal question is present in the case. The Supreme Court of Arkansas, in its most recent pronouncement on the issue, stated clearly:

> We have said that we will interpret Ark. R. Civ. P. 23 *in the same manner* the federal courts interpret the comparable Fed. R. Civ. P. 23.

*Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. at 336, 5 S.W.3d at 432 (emphasis added). Thus, the Supreme Court of Arkansas is relying on federal precedent for guidance rather than as controlling law, just as the independent and adequate state grounds test envisions.

The Supreme Court of Arkansas is free to construe its own rule of civil procedure in any way it chooses, as long as that construction is constitutional. The Supreme Court of Arkansas has promulgated a long line of opinions on the proper scrutiny courts should give class certification decisions. The most recent of these cases were cited in the Supreme Court of Arkansas's opinion in this case, where the justices explicitly chastised BNL Equity:

> The appellants, however, are plowing old ground in raising an issue that has clearly been decided by this court. Most recently, we said:
>
> > We have held that neither the trial court nor the appellate court may delve into

> the merits of the underlying claim in determining whether the elements of Rule 23 have been satisfied. In that regard a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action. Thus, the propriety of a class action is "basically a procedural question."

*BNL Equity*, 10 S.W.3d at 841 (quoting *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. at 335, 5 S.W.3d at 431 (1999)).

## B. ARKANSAS RULE OF CIVIL PROCEDURE 23 IS A PROCEDURAL RULE THAT DOES NOT IMPLICATE SUBSTANTIVE RIGHTS.

According to prevailing law, "Supreme Court jurisdiction to protect federal rights requires distinction between state procedural grounds and state substantive grounds in an assessment of independence and adequacy." *See* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4021 (2d ed. 1996 and Supp. 2000). The Supreme Court of Arkansas has held that the construction of Rule 23 is a procedural issue which does not implicate substantive rights. *See Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. at 335, 5 S.W.3d at 431 (1999). In *Phillps Petroleum v. Shutts*, this Court discussed the requirements of the Due Process Clause in the context of class actions: "notice, an opportunity to be heard, a right to opt out, and adequate representation." *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). While the *Shutts* case discussed procedural due process requirements necessary to

bind absent class members, its holding is broad enough to include due process requirements for class-action defendants as well.

Petitioners had notice of the class certification hearing, and they actually appeared and presented their case both at the trial and appellate court levels. Petitioners make no claim that the trial or appellate courts denied them an opportunity to defend themselves against respondents' claims. Thus, procedural due process was served by the Arkansas procedure, and petitioners' constitutional rights are not implicated.

## C. A GRANT OF CERTIORARI IN THIS CASE WOULD VIOLATE FUNDAMENTAL PRINCIPLES OF THE CONSTITUTIONAL FEDERAL SYSTEM.

Even though Arkansas Rule of Civil Procedure 23 is to be construed using federal precedent, principles of federalism demand that Arkansas be given leeway to promulgate its own rules and construe these rules as its courts deem proper. States are and should be free to set up their own procedural requirements and to have control over their own court systems. Arkansas and other states may use Rule 23 of the Federal Rules of Civil Procedure precedent as persuasive authority, but federal authority should not be controlling, especially when the rule at issue is a state procedural rule. According to Wright, Miller & Cooper:

> State courts have their own strong interests in applying state procedure to litigation that involves federal questions. At a minimum, courts and counsel are familiar with the local procedure, and often are better able to apply it correctly than

> federal procedure. Even if litigators and courts were equally well versed in both state and federal procedure, moreover, efficiency is promoted and mistake-inducing confusion is avoided by applying a uniform and integrated set of rules to litigation in a single case. State courts, further, may have developed a procedure that is either intrinsically better than federal procedure, or that is better adapted to the institutional setting of the state courts. The state interest, in short, is in following procedure that is familiar, uniform, and good. The Supreme Court as well has an interest in leaving state courts free to follow their own procedure.

Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4021.

In this case, respondents submit that the proper prudential path for this Court to take is to deny petitioners' request for a writ of certiorari to the Supreme Court of Arkansas. The state trial and appellate court decisions were based on independent and adequate state grounds, proper procedure was followed, and the federal system compels deference to the Arkansas appellate court's decision in this case. The writ should be denied.

## III.

## PETITIONERS DID NOT PROPERLY RAISE OR PRESERVE THE QUESTION PRESENTED BY THEIR PETITION.

Questions to be reviewed by this Court must be raised and presented to the court rendering the judgment below. In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court stated:

> With "very rare exceptions" . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

*Id.* at 86 (citations omitted) (citing *Heath v. Alabama*, 474 U.S. 82 (1985)). In addition, it is well-settled that "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Id.* (citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987)).

In *Adams*, this Court granted certiorari to decide whether Alabama's state class action rules violated federal due process standards. Later, this Court dismissed the writ, holding that certiorari was improvidently granted because the issue was not properly raised in the courts below. The Court reached this decision even though the petitioners in *Adams* had addressed the federal question in their briefs at the trial court and state supreme court levels. *See id.* at 87-89.

The Supreme Court of Arkansas' opinion in this case is resoundingly silent concerning petitioners' due process claim. Thus, petitioners must overcome the presumption that the issue was not presented to the Arkansas Supreme Court. *See Adams*, *supra*, 520 U.S. at 86-87. Petitioners undeniably have failed to overcome this presumption and are barred from raising the due process claim before this Court.

Petitioners assert that the claim was properly raised before the trial court and the Arkansas Supreme Court.

*See* Petitioners' Brief, at 6-7. Petitioners, however, are under an obligation to do more than merely raise the issue. As discussed in the *Adams* case, the petitioners have the burden of proving they presented the federal claim with "fair precision and in due time." *Adams*, 520 U.S. at 88. It is axiomatic that this Court should not "disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90.

Supreme Court Rule 14(g)(i) states that a petition for writ of certiorari should contain, among other materials,

> (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
>
> > (i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to

> review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

Sup. Ct. R. 14(g)(i).

Petitioners have not demonstrated that they adequately presented their due process argument to either the trial court or the Supreme Court of Arkansas. The requirements of Rule 14(g)(i) have not been followed with sufficient specificity because the pages of the record cited by petitioners are voluminous. This Court, however, does not have the actual pages reproduced or a fair and accurate summary of those pages. Moreover, the Arkansas courts were never asked or given the proper opportunity to contour their interpretation of Arkansas Rule of Civil Procedure 23 in a due process context. For this reason, the writ should be denied.

## CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

JOHN E. TULL III
*Counsel of Record*
PATRICK W. MCALPINE
QUATTLEBAUM, GROOMS, TULL
& BURROW PLLC
111 Center Street
Suite 1850
Little Rock, Arkansas 72201
(501) 379-1700

JAMES R. PENDER
MICHAEL J. PTAK
PENDER, MCCASTLAIN & PTAK, P.A.
900 South Shackleford
Suite 750
Little Rock, Arkansas 72211
(501) 312-2020

PETER G. KUMPE
WILLIAMS & ANDERSON LLP
Twenty-Second Floor
111 Center Street
Little Rock, Arkansas 72201
(501) 372-0800

*Attorneys for Respondents*